

OAH Docket Nos. 65-1901-23123
65-1901-23122
65-1901-23110

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

vs.

**ORDER ON REQUEST TO
PARTICIPATE AND/OR
MOTION TO INTERVENE**

Strom Engineering Corporation,

Respondent.

These above-entitled matters came before Administrative Law Judge Ann O'Reilly pursuant to Notices and Orders for Hearing and Prehearing Conferences filed on October 11, 2012.

On April 16, 2013, the Bakery, Confectionery, Tobacco Workers and Grain Millers Union (BCTGM Union) Local 167G filed a Notice of Intent to Participate as a Party under Minn. R. 5210.0573 (Request) and alternative Motion to Intervene under Minn. R. 1400.6200 (Motion), collectively referred to herein as "Request/Motion." The BCTGM Local 167G Request/Motion was filed in all three of the above files.

On April 24, 2013, Strom Engineering Corporation (Strom) filed an objection to BCTGM Local 167G's Request/Motion.

On May 1, 2013, a hearing was held on BCTGM Local 167G's Request/Motion. Jackson Evans, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). Aaron Dean, Best & Flanagan, appeared on behalf of Strom. John Risky, President, appeared on behalf of BCTGM Local 167G (Local 167 G). Also appearing was Roger Delage, President of BCTGM Local 267G (Local 267G).

On May 6, 2013, BCTGM Local 267G filed a Notice of Intent to Participate as a Party under Minn. R. 5210.0573 and alternative Motion to Intervene under Minn. R. 1400.6200. The Local 267G Request/Motion was filed only with respect to OAH Docket No. 65-1901-23123. The Motion record closed upon the filing of Local 267G's Request/Motion.

Based upon the proceedings, hearing record, memoranda and files herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. BCTGM Local 167G's Notice of Intent to Participate as a Party under Minn. R. 5210.0573 and alternative Motion to Intervene under Minn. R. 1400.6200 is **DENIED**.

2. BCTGM Local 267G's Notice of Intent to Participate as a Party under Minn. R. 5210.0573 and alternative Motion to Intervene under Minn. R. 1400.6200 is **DENIED**.

Dated: June 4, 2013

s/Ann O'Reilly
ANN O'REILLY
Administrative Law Judge

Reported: Digitally Recorded. No transcript prepared.

MEMORANDUM

Factual Background

These three matters arise out of Minnesota Occupational Safety and Health Administration (MNOSHA) citations issued to Strom on January 24, 2012, February 8, 2012, and February 15, 2012, arising out of Strom's work at the American Crystal Sugar and United Sugar (Crystal Sugar) facilities located in Chaska, Moorhead, and Crookston, Minnesota.¹

The first citation was issued to Strom on January 24, 2012, at the Moorhead facility, and is the subject of OAH Docket No. 65-1901-23110.² That citation alleges machine guarding was not provided to protect operators and other employees from hazards created by moving machinery parts in violation of 29 C.F.R. 1910-212(a)(1).³

¹ See Notice and Order for Hearing and Prehearing Conference on file and of record in each matter.

² See Notice and Order for Hearing and Prehearing Conference on file in OAH Docket No. 65-1901-23110 at Ex. 2.

³ *Id.*

The second set of citations was issued to Strom on February 8, 2012, at the Chaska facility, and is the subject of OAH Docket No. 65-1901-23122.⁴ Those citations allege that Strom:

- (1) Failed to furnish to each employee conditions of employment and a place of employment free from hazards in violation of Minn. Stat. § 182.653, subd. 2;
- (2) Failed to develop, document and utilize procedures for the control of potentially hazardous energy in violation of 29 C.F.R. 1910.147(c)(4)(i);
- (3) Failed to provide training regarding an energy control program in violation of 29 C.F.R. 1910.147(c)(7)(i);
- (4) Failed to develop and implement a Right-to-Know training program in violation of Minn. R. 5206.0700, subps. 1 and 2; and
- (5) Failed to enter a recordable injury or illness on the OSHA 300 log and/or complete an incident report in violation of 29 C.F.R. 1904.29(b)(3).⁵

These citations arose out of a Strom employee being injured while performing work on a pipe threader machine.⁶

The third set of citations was issued to Strom on February 15, 2012, at the Crookston facility, and is the subject of OAH Docket No. 65-1901-23123.⁷ Those citations allege that Strom:

- (1) Failed to develop, document and utilize procedures for the control of potentially hazardous energy in violation of 29 C.F.R. 1910.147(c)(4)(i);
- (2) Failed to provide machine guarding in violation of 29 C.F.R. 1910.212(a)(1);
- (3) Allowed unguarded projecting shaft end(s) that projected more than one-half the diameter of the shaft in violation of 29 C.F.R. 1910.219(c)(4)(i).⁸

Strom is a non-union employer that provided temporary staffing to Crystal Sugar while Crystal Sugar's union employees were on strike.⁹ The strike lasted approximately

⁴ See Notice and Order for Hearing and Prehearing Conference on file in OAH Docket No. 65-1901-23122 at Ex. 2.

⁵ *Id.*

⁶ *Id.*

⁷ See Notice and Order for Hearing and Prehearing Conference on file in OAH Docket No. 65-1901-23123 at Ex. 2

⁸ *Id.*

⁹ See Objection to Notice to Intent dated April 24, 2013.

20 months.¹⁰ At the time of all alleged MNOSHA violations, Crystal Sugar's union employees were on lock-out and Strom was providing a temporary workforce to Crystal Sugar in its Moorhead, Chaska, and Crookston facilities.¹¹

The lock-out ended in April 2013, when Crystal Sugar's BCTGM Union employees approved a contract with Crystal Sugar.¹² Union workers were expected to return to all facilities in May 2013.¹³

While Crystal Sugar BCTGM Union employees have now returned to work at the Crystal Sugar facilities, at the time of the alleged violations and the issuance of the citations, there were no BCTGM Union employees working at the subject Crystal Sugar facilities (Moorhead, Chaska, and Crookston) or employed by Strom.¹⁴

As a contractor providing staffing to Crystal Sugar facilities, Strom asserts that it had no ownership or control over the facilities or worksites, including the machinery used by the Strom workers. Strom is a non-union employer and none of the employees working for Strom at the Crystal Sugar facilities at the time of the violations were members of the BCTGM Union.¹⁵

Local 167G represents the Crystal Sugar employees that work at the Moorhead facility, where the citation in OAH Docket No. 65-1901-23110 arose.¹⁶ Local 267G represents the Crystal Sugar employees that work at the Crookston facility, where the set of citations in OAH Docket No. 65-1901-23123 arose.¹⁷ None of the Local 167G or Local 267G members were employees of Strom or were present at the Moorhead or Crookston facilities when the alleged violations occurred.¹⁸ Indeed, these BCTGM Union employees just returned to work at the facilities in May 2013 – well over a year after the alleged violations occurred.

No Request to Participate or Motion to Intervene was filed by the Local BCTGM Union representing the union workers at the Chaska facility. Accordingly, there is no Request or Motion pending with respect to OAH Docket No. 65-1901-23122 (Chaska).

At the hearing of this matter, both Local 167G and Local 267G representatives stated that they did not seek to participate in these matters "as parties," necessarily, but sought party status so that they could "monitor" the proceedings.¹⁹

¹⁰ *Id.*

¹¹ *Id.*

¹² Statements of John Risky during Motion Hearing on May 1, 2012.

¹³ *Id.*

¹⁴ See Objection to Notice to Intent dated April 24, 2013.

¹⁵ *Id.*

¹⁶ Statements of John Risky during Motion Hearing on May 1, 2012.

¹⁷ Statements of Roger Delage during Motion Hearing on May 1, 2012.

¹⁸ See Objection to Notice to Intent dated April 24, 2013.

¹⁹ Statements of John Risky and Roger Delage during Motion Hearing on May 1, 2012.

The Department expressed its support of the Union's requests and motions.²⁰ The Department noted that the BCTGM Union was never decertified during the lock-out, even though its members were not present in the facilities at the time of the alleged violations.²¹ The Department argues that the conditions that existed at the time of the alleged violations may continue to expose Union employees to hazards upon their return to the facilities.²² According to the Department, the Union has a "vested interest" in the safety of its employees, even during a time when the Union's members were not working at the facilities.²³

Intent to Participate as a Party Pursuant to Minn. R. 5210.0573

MNOSHA Rules provide that affected employees and their authorized representatives have the right to participate as parties in contested case proceedings involving MNOSHA violations.²⁴ Minn. R. 5210.0573, subp. 1 provides:

If a notice of contest is timely filed by an employer, affected employees or authorized employee representatives may participate as parties in the contested case proceeding by filing a notice of intent to participate as a party at least 45 days before the start of the hearing. The notice of intent to participate as a party must contain the name, address, and representative, if any, of the affected employee or authorized employee representative **or authorized employee representative of affected employees of the cited employer**. The notice shall be filed with the commissioner or the administrative law judge if one has been assigned to the proceeding and served upon all parties at the time of filing.

Subpart 3 describes the circumstances in which a party may object to a notice of intent to participate. It provides:

A party to the contested case proceeding may file a written objection to a notice of intent to participate as a party on the grounds that the person requesting party status is not an affected employee, an authorized employee representative of affected employees, or the cited employer, or that the notice does not comply with the requirements of the subpart. The objecting party shall file the written objection with the commissioner or with the administrative law judge, if one has been assigned to the proceeding, and serve the written objection upon all other parties and upon the person requesting party status. The written objection must be filed and served within ten days after the date the notice of intent to participate as a party was filed and served upon the parties. If no written objection to the notice of intent to participate as a party is filed and served within ten days after

²⁰ See oral argument of Jackson Evans at Motion Hearing on May 1, 2012.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Minn. R. 5210.0573 (2012).

the date the notice was filed and served upon the parties, the person requesting party status shall become a party to the proceeding. If a written objection is filed by a party with the commissioner, the commissioner shall immediately request that an administrative law judge be assigned to the proceeding and refer the notice and the objection to the assigned administrative law judge for determination of party status.

The timeliness of the Notices of Intent to Participate and Strom's Objection is not in dispute in this matter. All Notices and Objections were timely and properly filed and served. The issue presented is whether Local 167G and Local 267G are "authorized employee representatives" of the "affected employees" of the "cited employer."

"Affected employee" is defined in Minn. Stat. § 182.651, subd. 21 (2012) and Minn. R. 5210.0005, subp. 4 (2008) as "**a current employee of a cited employer** who is exposed within the scope of employment to the alleged hazard described in the citation."²⁵ The cited employer in each of these matters is Strom, not Crystal Sugar.

The employees of the cited employer (Strom) who were allegedly exposed to the hazardous conditions which formed the bases for the citations, were all non-union employees of Strom, not of Crystal Sugar. Moreover, none of the current employees of Strom are represented by Local 167G, Local 267G, or the BCTGM Union. Thus, none of the "affected employees" were members of Local 167G, Local 267G, or the BCTGM Union.

As a result, Local 167G, Local 267G, and the BCTGM Union is not an "authorized employee representative" of the "affected employees" of the cited employer. "Authorized employee representative" is defined in Minn. Stat. § 182.651, subd. 22 (2012) and Minn. R. 5210.0005, subp. 5 (2008) as "a labor organization that has a collective bargaining relationship **with the cited employer and that represents affected employees.**"²⁶

It is undisputed that the BCTGM Union does not have a collective bargaining relationship with Strom. Nor does the BCTGM Union represent the "affected employees." Accordingly, there is no basis in Minn. R. § 5210.0573, subp. 1, for Local 167G or Local 267G to participate as parties in any of these matters.

Motion to Intervene Pursuant to Minn. R. 1400.6200 and 5210.0573

As an alternative to a Notice of Intent to Participate under Minn. R. 5210.0573, a union may move to intervene under Minn. R. 1410.6200 and 5210.0573, subp. 4. Minnesota Rules 5210.0573, subp. 4, provides that "Intervention by other persons may be granted by the administrative law judge according to part 1400.6200."

²⁵ Minn. R. 5210.0005, subp. 4 refers to the definition of "affected employee" prescribed in Minn. Stat. § 182.651 (emphasis added).

²⁶ Minn. R. 5210.0005, subp. 5, refers to the definition of "authorized employee representative" prescribed in Minn. Stat. § 182.651 (emphasis added).

Minnesota Rule 1400.6200, subp. 1 provides that “any person” not named in the notice of hearing but who desires to intervene in a contested case as a party may petition for intervention by filing a written petition to intervene. The petition must show how the petitioner’s legal rights, duties, or privileges may be determined or affected by the contested case; how the petitioner may be directly affected by the outcome; or how petitioner’s participation is authorized by statute, rule, or court decision.²⁷

Under Minn. R. 1400.6200, subp. 3, the judge “shall allow intervention upon a proper showing pursuant to subpart 1 unless the judge finds the petitioner’s interest is adequately represented by one or more parties participating in the case.” Here, Local 167G and Local 267 have failed to establish a statutory basis for intervention. As set forth above, Local 167G and Local 267G do not qualify as “authorized representatives of affected employees,” and none of their members qualify as “affected employees.” Therefore, neither Local 167G nor Local 267G has a relationship to the affected employees in this case.

In addition, neither Local 167G nor Local 267G have established how their rights or the rights of their members will be affected or determined by these cases. None of their members are, or have ever been, employees of Strom, the cited employer. None of their members were working at the facilities when the alleged violations occurred or when the citations were issued. Indeed, only Strom employees were affected.

The Department and the Union representatives argue that when the lock-out ends, their represented employees will be at risk of being exposed to the same alleged hazards that existed at the time of the citations. Such a claim fails. Now that the lock-out has ended, Strom is no longer providing staffing at the Crystal Sugar facilities. Thus, any exposure to hazards allegedly caused **by Strom** will not exist for BCTGM Union members going forward. Any exposure to continuing hazards in the Crystal Sugar facilities or related to its machinery shall be the sole responsibility of Crystal Sugar, not Strom. In addition, any “failure to train” violations cited to Strom only affect Strom employees, not BCTGM Union members.

In short, the outcome of these cases will not affect BCTGM Union members or their rights, duties or privileges. Consequently, Local 167G and Local 267G have no interest in these proceedings and their Motions to Intervene are hereby denied.

A. C. O.

²⁷ *Id.*